NO. 91-26

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

AVANTI SERVICES, INC.,
Petitioner

V.

GLENDEL DRILLING COMPANY and
PIONEER PRODUCTION CORPORATION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

Under general maritime law, contractual provisions which shift liability by requiring indemnity for the indemnitee's own fault are enforceable. The legislatures of various states have recognized that such liability shifting agreements remove incentives for personnel safety, and so have sought to protect the safety of their citizens who work in the maritime environment of oilfields by voiding such agreements as against public policy.

Conflicting decisions within the Fifth Circuit have resulted in criteria to determine whether a contract is maritime or non-maritime, in which latter case state law applies to void the indemnity agreement. The application of those conflicting criteria yields results which the panel herein described as "rather absurd."

The questions presented are:

1. Whether liability shifting via contractual indemnity should be disallowed in maritime law (as is liability shifting via tort indemnity) in the interest of safety?

2. Whether state anti-indemnity statutes applicable to offshore oil and gas exploration and production should be adopted as "substitute" maritime law in the interest of safety?

3. What criteria should properly be utilized in determining whether a contract is maritime or non-maritime?

LIST OF PARTIES

1. Petitioner, Avanti Services, Inc. has no parent companies or subsidiaries.

The insurer of Avanti Services, Inc. is Mutual Fire, Marine & Inland Insurance Company, in rehabilitation, Constance B. Foster, Commonwealth of Pennsylvania, Rehabilitator.

2. Respondent, Glendel Drilling Company, has no parent companies. GCH Drilling Ventures is a wholly-owned subsidiary of Glendel Drilling Company.

The subrogated insurer of Glendel Drilling Company is Highlands Insurance Company, which is a wholly-owned subsidiary of Halliburton, Inc.

3. Respondent, Pioneer Production Corporation, is now a wholly-owned subsidiary of Mesa Operating Ltd. Partners, including Mesa Limited Partnership and Pickens Operating Company, all of which are owned or controlled by T. Boone Pickens.

The subrogated insurer of Pioneer Production Corporation is Mission National Insurance Company, in receivership, James D. Odiorne, Austin, Texas, Ancillary Receiver.

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IN THE

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OCTOBER TERM, 1991

No._____

AVANTI SERVICES, INC.,
Petitioner

V.

GLENDEL DRILLING COMPANY and
PIONEER PRODUCTION CORPORATION,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Avanti Services, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 898 F.2d 1083, and is reprinted in the appendix to this petition at Pet. App. 1a - 11a. The denial of panel and *en banc* rehearing is reported at 931 F.2d 892, and is reprinted in the appendix to this petition at Pet. App. 12a - 13a. The opinion of the United States District Court for the Western District of Louisiana regarding the applicability of maritime law is unpublished and is reprinted in the appendix hereto at Pet.

App. 14a - 19a. The opinions of the United States District Court for the Western District of Louisiana regarding reasonableness of the settlements based on the probable liability of Avanti's indemnitees are unpublished and are reprinted in the appendix hereto at Pet. App. 20a - 25a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 26, 1990. A Petition for Rehearing before the panel and a Suggestion for Rehearing *en banc* were denied on April 16, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Louisiana Oilfield Anti-Indemnity Statute, La. Rev. Stat. Ann. § 9:2780, is set forth in the appendix to this petition at Pet. App. 26a - 30a.

Texas has adopted a similar statute. Tex. Civ. Prac. & Rem. Code Ann. § 127,001 et seq.

STATEMENT OF THE CASE

The petition in this case arises out of the granting of a motion for summary judgment in the trial court and the affirmance of that summary judgment by the appellate court. There are, then, no issues of fact to cloud the purely legal issues raised in this petition.

Petitioner, Avanti Services, Inc. ("Avanti") contracted with Pioneer Production Corporation, now Mesa Operating Ltd. Partners ("Pioneer") to drill and complete an oil/gas well on Pioneer's lease in Louisiana's inland waters. Avanti then contracted with Glendel Drilling Com-

pany ("Glendel") for Glendel to provide a drilling barge and drilling crew, and with Schlumberger Well Services ("Schlumberger") to provide wireline down-hole services consisting, *inter alia*, of taking and analyzing core samples. Schlumberger's equipment was located on a barge adjacent to Glendel's drilling barge. On the side of Glendel's barge, there was a hatch door which was bent and jammed open so as to obstruct passage along the perimeter of the barge. Glendel knew of the jammed door and knew that Schlumberger personnel were using that doorway to pass along the perimeter of Glendel's barge. A Schlumberger employee, Ernest Lewis, fell from Glendel's barge while attempting to make his way past the hazard created by the bent and jammed door. His body was found in the water in the vicinity of the door.

As is typical in the oilfield, the contracts between Avanti/Glendel and Avanti/Pioneer obligated Avanti to hold harmless and indemnify the other parties, even for those parties' own fault.

Before trial, Glendel and Pioneer settled with Ernest Lewis' widow. The trial court entered summary judgment on both the reasonableness of the settlements and Avanti's obligation to indemnify the settlors because the indemnity provisions were governed by maritime law rather than state law.

The appellate court questioned both the logic and the persuasiveness of the jurisprudence which it felt compelled to follow in finding that maritime law governed the enforceability of the indemnity provision. It recognized

> the rather absurd inconsistency that. . .exists between applying maritime law to certain mineral exploration contracts when the drilling occurs in

> state territorial waters, as here, while state law governs precisely the same contractual relationship a few miles further [sic] offshore pursuant to the OCSLA.

898 F.2d at p. 1087 (citations omitted).

In its opinion, it left the decision regarding "an apparently contradictory line of cases in our circuit and the uncertain policy underpinning our result" to the *en banc* court (898 F.2d at p. 1085).

Nevertheless, after considering the matter for over a year, the appellate court denied both panel rehearing and rehearing *en banc*.

JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction in the trial court was under general maritime law. 28 U.S.C. § 1333(1).

REASONS FOR GRANTING THE WRIT

Using the guidelines set forth in Rule 10 of the Rules of this Court, petitioner respectfully suggests that:

I. a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court;

II. a state court of last resort has decided a federal question in a way that conflicts with the decision of a United States court of appeals; and

III. a United States court of appeals has rendered a decision which acknowledges a conflict between decisions of that same court.

Petitioner will now treat each of these reasons in turn.

I.

CONTRACTUAL LIABILITY SHIFTING

As the panel decision herein noted:

> Moreover, for the purposes of interpreting the reach of federal maritime law, the relative importance that one attaches to the use of "vessel" in offshore oil exploration, the dissimilarity between such exploration and traditional maritime concerns, the impact of potential harm to maritime commerce, and the need for uniformity are matters that have not been settled by the Supreme Court or our court.

898 F.2d at 1087.

This case presents important public policy issues regarding the basic purpose of maritime law. Is that purpose to maintain the uniformity of maritime law at all cost, or is it to protect and promote safety for those individuals who make their livelihood in the maritime environment? Here, Glendel's incentive to maintain its barge so as to be safe for use by those people who work on it was reduced because Glendel would not be ultimately liable for accidents caused by its own fault. Glendel required Avanti to bear that ultimate cost, even though Avanti had no authority over Glendel's hazardous barge. As a result of that hazard, a life was lost.

It is respectfully submitted that, if the purpose of maritime law is to protect maritime workers by promoting

safety, that purpose is thwarted by the present state of maritime law, which allows enforcement of contractual indemnity to protect those (like Glendel) who engage in unsafe practices. Safety can be promoted in either of two ways:

A. By this Honorable Court holding that contractual indemnity for the indemnitee's own fault (like liability shifting via tort indemnity) no longer has a place in maritime law; or

B. By this Honorable Court holding that when a state has expressed an interest in the safety of its citizens who work in a maritime environment by legislatively enacting anti-indemnity statutes, those statutes serve as "substitute" maritime law.

A. ***No Place in Maritime Law***

In *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S.Ct. 1708, 44 L.Ed. 2d 251 (1975), this Court abandoned the admiralty rule of divided damages in collision cases, in favor of comparative fault. In footnote 11, it noted that

> It is difficult to imagine any manner in which the divided damages rule would be more likely to "induce care and vigilance" than a comparative negligence rule that also penalizes wrongdoing, but in proportion to measure of fault. A rule that divides damages by degree of fault would seem better designed to induce care than the rule of equally divided damages, because it imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others.

In *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1249 (5th Cir. 1979), the Court quoted from footnote 11 of *Reliable Transfer*, supra, and held that

> The reasoning of *Reliable Transfer* loses none of its cogency in the context of a non-collision personal injury case.

In *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 501 (5th Cir. 1982), it was recognized that the *Reliable Transfer* comparative fault principles has been extended in *Leger*, supra, to "non-collision personal injury cases as well." In following those comparative fault principles, it was also emphasized that tort indemnity based upon active/passive negligence, as a "method of liability shifting" (670 F.2d at 500) has

> no place in a liability system that considers the facts of each case and assesses and apportions damages among joint tortfeasors according to the degree of responsibility of each party.

670 F.2d at 502.

Since a voiding of contractual indemnity for the indemnitee's own fault does not violate either the Contract Clause[1] or the Equal Protection Clause[2] of the United States Constitution, there is no impediment to abandoning liability shifting via contractual indemnity in maritime law in the interest of safety, just as divided damages were abandoned in *Reliable Transfer* and liability shifting via tort indemnity was abandoned in *Loose*.

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[1] *Aucoin v. Pelham Marine, Inc.*, 593 F.Supp. 770, 777 n.3 (W.D. La. 1984).

[2] *Bryant v. Platform Well Service, Inc.*, 563 F.Supp. 760, 762-64 (E.D. La. 1983).

B. *"Substitute" Maritime Law*

Louisiana's Anti-Indemnity Statute does not conflict with any purpose of maritime law, nor is it preempted by federal maritime law. *Stoot v. Fluor Drilling Services, Inc.*, 851 F.2d 1514, 1518 (5th Cir. 1988). Indemnity clauses in maritime contracts are typically construed under maritime law (1) more or less by default because States have not had an extensive regulatory interest in contracts of indemnity and (2) because of the federal interest in maintaining a uniform body of maritime law. *Id.* In the area of oil and gas production on navigable waters, however, Louisiana has expressed on overriding interest in indemnity agreements because such agreements affect safety. Maritime law is "ill-adapted" to deal with oil and gas problems, while state law is well suited to do so. *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 955 (5th Cir. 1988). In this area, the uniformity of maritime law would not be disturbed to a degree which would justify excluding the expressed interest of the state. *Sohyde v. Coastal States Gas Producing Co.*, 644 F.2d 1132, 1138 (5th Cir. 1981). Should not Louisiana's Anti-Indemnity Statute (which is self-limiting to exploration for and production of minerals) be applied as "substitute" maritime law? *Kossick v. United Fruit Co.*, 365 U.S. 731, 741, 81 S.Ct. 886, 893, 6 L.Ed. 2d 56 (1961), *reh'g denied*, 81 S.Ct. 1657.

II.

STATE COURT CONFLICT

In *Rodrigue v. Legros*, 563 So. 2d 248 (La. 1990), *reh'g denied*, 563 So. 2d 257, the Louisiana Supreme Court concluded

> that application of the Louisiana [Oilfield Anti-

> Indemnity] statute would interfere with the uniform features of the federal maritime law in violation of the federal constitution.

Id. at 250.

This decision by Louisiana's court of last resort is in direct conflict with the U.S. Fifth Circuit decisions in *Stoot v. Fluor Drilling Services, Inc.*, supra, and *Sohyde v. Coastal States Gas Producing Co.*, supra.

The Louisiana Supreme Court also noted (as did the panel herein) the lack of guidance by this Court:

> Despite this multitude of cases involving the applicability of state law in maritime situations, the [United States Supreme] Court has developed no clear test for determining when such application is appropriate and when it violates the constitution.

Rodrigue v. Legros, supra, 563 So. 2d at 253.

III.

MARITIME CONTRACT CRITERIA

This case also presents the need for this Court to resolve what the panel decision herein described as "an apparently contradictory line of cases in our circuit and the uncertain policy underpinning our result ..." 898 F.2d at 1084.

The panel also noted that

> This case radiates with the uncertainties that exist in this area of the law. Although it is technically resolved by application of settled authority, the persuasiveness of that authority is much in doubt.

Id. at 1087.

The contradictory line of cases and the uncertainties referred to by the panel decision herein relate to the determination of a contract as maritime or non-maritime. At the time of the panel decision, there was one contradictory line of cases. They involved the characterization of various aspects of offshore oil exploration as "maritime commerce." Since the panel decision, other contradictory lines of cases have arisen to perpetuate the confusion. They involve the necessity of a "vessel" to a maritime contract and resort to the plaintiff's "seaman" status to determine whether a contract is maritime.

A. *Maritime Commerce*

The "apparently contradictory line of cases" to which the panel referred culminated in two contradictory decisions.

In *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986), it was held that offshore drilling for oil and gas is "maritime commerce." *Theriot* was based on *Pippen v. Shell Oil Co.*, 661 F.2d 378 (5th Cir. 1981), in which it was held that offshore wireline services are maritime in nature. In *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423, 105 S.Ct. 1421, 1427, 84 L.Ed. 2d 406, 414 (1985), this Court specifically criticized *Pippen's* "expansive view of maritime employment." The Fifth Circuit has recognized that, despite *Theriot*,

> The continued validity of these cases [upon which *Theriot* relied] has not been tested in light of *Herb's Welding*.[3]

Nevertheless, the panel herein felt compelled to apply

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[3] *Union Texas Petroleum v. PLT Engineering*, 895 F.2d 1043, 1049 n.10 (5th Cir. 1990).

Theriot (898 F.2d at 1068) and *en banc* rehearing to test the validity of those cases was denied.

The contradictory (and later) decision is *Thurmond v. Delta Surveyors*, 836 F.2d 952 (5th Cir. 1988), in which it was held that the providing of wireline services (which are a part of drilling) is "clearly a nonmaritime obligation." *Id.* at 955.[4] Rather than rely on the questionable validity of *Theriot* and the decisions upon which it was premised, the *Thurmond* panel applied the criteria laid down by this Court in *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed. 2d 454 (1972).

There is no difference between the use of a vessel for drilling and the use of the same vessel for wireline services (which were being performed herein by Schlumberger). Wireline services typically are done after the well is partially drilled in order to "log" the well to see where the oil is.[5] Both drilling and wireline services use the same specialized non-maritime appurtenances which have been imported from land use and placed on vessels—the derrick and draw works. Both the initial drilling and the following wireline services are parts of the same continuous project—oil and gas exploration and production. If wireline services are not maritime commerce, neither is drilling. The issue is whether waterborne oil and gas exploration and production

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[4] The *Thurmond* panel strove mightily to distinguish *Theriot* on the ground that the drilling contract in Theriot "specifically addressed the use of a ship," whereas the wireline service contract in *Thurmond* "did not address in any way the use of a ship" (836 F.2d at 955). However, as noted in Judge Garwood's concurrence, the work order for wireline services "called for the barge to itself function as the base from which the work could be performed." *Id.* at 957 n.1.

[5] *Domingue v. ODECO*, 923 F.2d 393, 394 n.3 (5th Cir. 1991).

(not the individual parts along the continuum of that enterprise) bears such a significant relationship to "maritime commerce" to oust otherwise applicable state law? So, the imagined distinction that the contract in *Theriot* called for services *including* wireline services, while the contract in *Thurmond* called *exclusively* for wireline services[6] is not a valid distinction.

B. *"Vessel" Status*

In the line of cases culminating in *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 (5th Cir. 1989), it was held that, when a structure is used primarily as a work platform, even though it once was used as a vessel, and any transportation function it serves is merely incidental to its use as a work platform, it is not a "vessel" under general maritime law. But *Theriot* ignored the fact that, in contracting for a barge to be used for either drilling or wireline services, or both, what was being contracted for is a work platform, not a "vessel." The *Theriot* court simply assumed that the barge was a "vessel" and so required the application of maritime law. The *Thurmond* court on the other hand, found that:

> The wireline services contract between P & S and Gulf Oil did not address in any way the use of a ship. The Barge KATHY's use for the transportation of wireline equipment and workers was incidental to the contract's principal obligation.

Thurmond v. Delta Surveyors, supra, 836 F.2d at 955.

The panel herein, following *Theriot*, did not address the "vessel" status issue.

It should be noted that, under *North Pacific S.S. Co.*

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[6] *Domingue*, supra note 5, 925 F.2d at 398.

v. Hall Bros. Maritime Ry. & S. Co., 249 U.S. 119, 39 S.Ct. 221, 63 L.Ed 510 (1919), whether the contract is to be performed on a vessel, or even on navigable waters, is not decisive. The fundamental question is the nature of the contract, which must have relevance to maritime commerce.

Nevertheless, *Thurmond* sought to distinguish *Theriot* on the ground that the contract in *Theriot* called for the use of a vessel. But the *Theriot* panel did not address the issue of the purpose the barge was intended to serve. It was satisfied with the mere fact that the contract called for a barge, no matter what its purpose.

So, the imagined distinction that the contract in *Theriot* called for the contractor to provide a barge as well as services, while the contract in *Thurmond* called for only services[7] is not only factually incorrect but it is also legally invalid. The inquiry should not be whether a barge is to be provided. It should be what purpose the barge is intended to serve.

C. ***Five Additional Factors***

In *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 315 (5th Cir. 1990), still another panel of the Fifth Circuit attempted to resolve the "confusion" which has resulted from the decisions in *Theriot*, *Thurmond*, and herein. In attempting to articulate "a fairly consistent underlying approach," the *Davis* panel utilized five factors to be considered in characterizing the contract, in addition to what the contract itself provides. In so doing, the *Davis* panel considered the Jones Act seaman status of the plaintiff's decedent (*id.* at 317). However, in two prior decisions,

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[7] *Domingue*, supra note 5, 923 F.2d at 397 ("In contrast [to *Theriot*], the contracts in *Thurmond* and in this case did not require that the contractor provide a vessel.").

it had been held that the plaintiff's seaman status is not determinative of the nature of his employer's contracts with others.[8]

In attempting to consider the five additional factors articulated in *Davis,* the *Domingue* panel went right back to attempting to distinguish *Theriot* and *Thurmond. Domingue,* supra note 5, 923 F.2d at 397.

So, not only does confusion still reign even after *Davis*, but it also seems appropriate to question whether any of *Davis'* additional five factors should properly be considered. Should not the nature of a contract be determined by the type of service(s) to be provided and the purpose of the vessel as contemplated in the contract?

CONCLUSION

I.

It is respectfully submitted that the writ should be granted so that maritime law can be made uniform as to liability shifting. A tort feasor cannot now shift away his liability (and his incentive to promote safety) via tort indemnity, but he can do so by the simple expedient of requiring a contractor to assume his liability in a contract.

If this Court does not agree that contractual liability shifting should be outlawed at the federal level, then the writ should be granted in order to give effect to the expressed interest of the various states in promoting the safety of their citizens by outlawing contractual indemnity shifting.

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[8] *Lefler v. Atlantic Richfield Co., Inc.*, 785 F.2d 1341, 1343 (5th Cir. 1986); *Jones v. Berwick Bay Oil Co., Inc.*, 697 F.Supp. 260, 267 (E.D. La. 1988).

If this Court will outlaw contractual liability shifting at either level, then the confusion which presently reigns in the Fifth Circuit and the Louisiana Supreme Court will be cured by mootness.

II.

If this Court does not agree that contractual liability shifting should be outlawed, then the writ should be granted so that this Court can cure the confusion in the Fifth Circuit, which was offered the opportunity to cure the confusion itself *en banc*, but declined to do so, and in the Louisiana Supreme Court.

Respectfully submitted:

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APPENDIX A

LEWIS v. GLENDEL DRILLING CO.

Beverly Locks LEWIS, Individually and as the Tutrix of Her Minor Children, Nona Aisha Lewis, Erisa Kironda Lewis, Jamal William Lewis, Benita Leshawn Lewis and Jeriel Nicole Lewis, Plaintiff,

v.

GLENDEL DRILLING COMPANY and Pioneer Production Corporation,
Defendants.

AVANTI SERVICES, INC., Defendant,
Third Party Defendant,
Cross-Defendant, Appellant,

v.

GLENDEL DRILLING COMPANY and
Highlands Insurance Company, Defendants,
Cross-Plaintiffs, Appellees,

Mesa (as Successors to Pioneer Production),
Third Pary Plaintiff,
Cross-Defendant, Appellee.

No. 88-4934.

United States Court of Appeals,
Fifth Circuit.

April 26, 1990.

Appeal from the United States District Court for the Western District of Louisiana.

Before GEE and JONES, Circuit Judges, and HUNTER [1], District Judge.

EDITH H. JONES, Circuit Judge:

This case confronts us again with the vexing question whether liabilities arising from offshore mineral exploration are to be determined under federal admiralty or state law. The result here is foreordained by precedent, but because of an apparently contradictory line of cases in our circuit and the uncertain policy underpinning our result, the appellant would justly ask "why?". Perhaps this court should seek to answer Avanti's question *en banc*.

I.

FACTS

Avanti Services, Inc., appellant, signed a turnkey contract with Pioneer Production Corporation (now Mesa Operating Ltd. Partners) to drill a well in Vermillion Block 55 in the territorial waters of Louisiana. Avanti hired Glendel Drilling to furnish a barge rig. The two contracts contain indemnity clauses designed to protect, respectively, Pioneer and Glendel from liability arising out of injuries to employees or invitees of Avanti on the drilling site.[2] Except for references to the furnishing of tugs or

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[1] Senior District Judge of the Western District of Louisiana sitting by designation.

[2] Pioneer-Avanti contract:

> 11.3 Contractor [Avanti] agrees to protect, defend, indemnify, and save Operator [Pioneer], its joint owners' and their respective officers, directors, and employees harmless from and against all claims, and causes of action of every kind and character, without limit and without regard to the cause or causes thereof or the negligence of any party or parties, arising in connection herewith in favor of Contractor's employees or

crewboats in a checklist of equipment needed for the drilling, neither contract mentions a vessel or any maritime condition as bearing upon the work to be performed. Given the location of drilling, however, the use of an offshore drilling rig was obviously necessary. The contracts are in large part form documents used in onshore and offshore mineral exploration.

During the drilling, Avanti hired Schlumberger Well Services to log the well's progress. On April 16, 1985, Schlumberger's crew was on the rig either engaged in or just having completed this task when it was discovered that Ernest Lewis, an employee of Schlumberger, had drowned. He had apparently been trying to transfer to the pipe barge, and thence to Schlumberger's equipment barge, which were moored next to Glendel Rig 18.

Lewis's widow filed suit alleging general maritime claims against Pioneer, Glendel, and Avanti and a Jones Act claim against Schlumberger. The liability actions eventually settled, leaving for resolution the cross-claims for contractual indemnity filed by Pioneer and Glendel against Avanti.[3] The Court initially granted Pioneer's and

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Footnote 2 continued.

Contractor's sub-contractors or their employees, on account of bodily injury, death, or damage to property.

Avanti-Glendel contract:

14.9 Operator's indemnification of Contractor. Operator [Avanti] agrees to protect, defend, indemnify, and save Contractor [Glendel], its officers, directors, employees and joint owners harmless from and against all claims, demands, and causes of action of every kind and character, without limit and without regard to the causes or causes thereof or the negligence of any party or parties, arising in connection herewith in favor of Operator's employees or Operator's contractors or their employees, or Operator's invitees, other than those parties identified in paragraph 14.8 on account of bodily injury, death or damage to property. . . ."

[3] Avanti's contracts with Schlumberger and Glendel did not permit

Glendel's motions for summary judgment granting indemnity under maritime law, but upon Avanti's request, it decided to hold a hearing and reconsider.

Avanti alleged that a fact issue existed concerning whether Schlumberger was its invitee at the time of the accident. Avanti had stitched together a circumstantial case suggesting that after Schumberger finished its work for Avanti on April 16, it commenced an entirely different logging operation that must have been ordered by the lease operator Pioneer. If the accident occurred during the later, hypothetical engagement, Avanti contended, Schlumberger and Lewis its employee, had become Pioneer's invitees and the indemnity tables were turned, because Avanti was owed indemnity by Pioneer for injury to Pioneer's invitees. The court, after a hearing and receiving further evidence and briefs, rejected Avanti's argument and entered judgment calling for Avanti to indemnify Pioneer and Glendel according to their settlements with Plaintiffs.[4]

On appeal, Avanti continues to urge that summary judgment was erroneously ordered on the invitee issue. More important, however, Avanti questions the applicability of maritime law to its contractual indemnity obligations. We shall discuss these issues in inverse order.

Footnote 3 continued.

indemnity of Avanti for loss attributable to Avanti's payments of contractual indemnity. *See Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir.1981).

[4] No other issues relating to the indemnity obligations are before us.

II.

CONTRACTS FOR OFFSHORE OIL DRILLING AS MARITIME CONTRACTS

Avanti contends that its contracts with Pioneer to drill the wildcat well in Louisiana territorial waters and with Glendel to furnish its barge rig for that purpose are not maritime contracts.[5] The essence of a maritime contract, Avanti urges, is a connection with a vessel, but the instant contracts do not refer to a vessel. In a broader sense, Avanti urges that there is nothing inherently maritime in the business of offshore mineral exploration and that state law is better suited to resolve the problems it poses. Finally, because the contract which led to the death of Ernest Lewis was for the performance of wireline services by Schlumberger, Avanti contends that we are bound by our past recognition that wireline services performed offshore do not constitute maritime activity. *Thurmond v. Delta Well Surveyors*, 836 F.2d 952 (5th Cir. 1988).

[1,2] The relevant law of our circuit does not support Avanti's argument. Since at least as early as 1970, our authorities have identified contracts for offshore drilling and mineral operations involving the use of a "vessel" as maritime in nature. *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir.1986) (contract for use of "the drilling barge Rome"); *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir.1981) (contract for casing services to be performed on an inland drilling barge); *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge "Mr. Charlie"*, 424 F2d

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[5] If Louisiana law governs Avanti's contracts with Pioneer and Glendel, Avanti would not be liable for contractual indemnity by operation of Louisiana's Oil Field Anti-Indemnity Act, La. Rev.Stat.Ann. § 9:2780 (West.Supp.1989).

684, 691 (5th Cir.1970) (as to contract for offshore drilling and reworking operations, the court said "of course, the construction of a maritime contract is governed by federal, not state, law." [citations omitted]). Likewise, each of these cases interpreted an indemnity clause in the particular drilling or offshore servicing contract. As Avanti concedes, a contract need not specifically reference a vessel if it is actually "maritime". The drilling contract in *Theriot, supra,* provided that the drilling company "would furnish the equipment, materials, supplies, and services necessary to the drilling and completion of the well." 783 F.2d at 538. These terms are substantially similar to the terms of the contract between Avanti and Pioneer. The court's conclusion in *Theriot* that the contract "focused upon the use of a vessel", *i.e.* the drilling barge identified in an exhibit to the contract, inescapably leads to the same conclusion in this case.

A recent decision of this court questions whether *Theriot's* broad characterization of maritime contracts comports with the Supreme Court's decision in *Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985). *See Union Texas Petroleum Corp. v. PLT Engineering, Inc.* 895 F.2d 1043 (5th Cir.1990). Judge Brown's opinion in *Union Texas* goes on to

> construe *Theriot* narrowly and constrain it to its facts. Since no drilling on navigable waters from a vessel is involved here, *Theriot* is not controlling.

Union Texas, at 1049. "Constrained to its facts," however, *Theriot* still controls the result in this case. Avanti's reliance on *Union Texas* must be limited to a plea for en banc review of the *Theriot* line of cases.

Only one case arguably runs counter to this authori-

ty. Avanti relies heavily on *Thurmond* for the proposition that a contract to furnish wireline services is "clearly a non-maritime obligation". . . "performed on land-based wells and offshore wells, and wireline services present hazards and problems peculiar to the oil and gas industry. 836 F.2d at 955. *Thurmond* applied state law to the construction of an indemnity clause in a wireline service contract, although the contract was performed and the employee injured while working on a wireline barge in Louisiana territorial waters. *Thurmond* is, however, distinguishable precisely because the contract there interpreted called solely for the performance of wireline services by a contractor. Because our other cases hold that contracts to drill a well offshore or to provide general services in connection therewith are, when performed from a movable drilling platform, maritime obligations, we must be bound by those authorities rather than by the special-purpose contract in *Thurmond*.

More difficult to dispose of is Avanti's reliance on the choice-of-law analysis applied by *Thurmond* and *Union Texas*. For although we are bound by cases construing contracts essentially analogous to those in issue here, we recognize the logical conflict between holding that such cases are inherently maritime while a contract for wireline services, not specifically referencing the offshore nature of the work, but actually performed from a barge, is not. Judge Garwood noted the apparent inconsistencies among some of our cases in this area, as well as their failure to cross-cite each other, in his concurrence to *Thurmond*, 836 F.2d at 957-58.

From these inconsistent lines of authority springs the potential for significant uncertainty in the law applicable to offshore mineral exploration. The application of maritime or state law to a particular contract may turn, as

in *Thurmond*, on the degree of specificity with which it identifies operations offshore or on navigable waters. It may turn on whether the particular contractor furnished a "vessel" in connection with his work. It may depend on whether the work is performed from a fixed platform or one of the several types of movable rigs that we have held to be "vessels." By act of Congress, whether the contract covered activity in state territorial waters or on the Outer Continental Shelf will also have an impact on the choice of law. *See* Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(a); *Laredo Offshore Constructors Inc. v. Hunt Oil Company*, 754 F.2d 1223 (5th Cir.1985).

How to resolve these inconsistencies is perplexing. What appears to us as a serious legal conundrum may have had little effect in the real world. That is to say, oil companies, drilling contractors and oil field service companies, together with their insurers, may already have adjusted to the overlapping applications of maritime and state law by choice of law clauses[6] or adjustments in the rates of coverage. We should not lightly "straighten out" the formal logic of the law where to do so would upset stable commercial expectations. Moreover, for purposes of interpreting the reach of federal maritime law, the relative importance that one attaches to the use of "vessels" in offshore oil exploration, the dissimilarity between such exploration and traditional maritime concerns, the impact of potential harm to maritime commerce, and the need for uniformity are matters that have not been settled by the Supreme Court or our court.

This case radiates with the uncertainties that exist in

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[6] *See, e.g., Angelina Casualty Co. v. Exxon Corp.*, 876 F.2d 40, 42 (5th Cir.1989); *but compare Union Texas, supra*, at 1050 (parties may not contract away choice of law mandated by Congress through OCSLA).

this area of the law. Although it is technically resolved by application of settled authority, the persuasiveness of that authority is much in doubt.

There are at least three ways to resolve the inconsistency among our precedents. First, we could hold that no movable offshore oil and gas rig, when moored and engaged in exploration or production, is a vessel. This would apply the realistic view of *Thurmond* and *Sohyde Drilling & Marine Co. v. Coastal States Gas Producing Co.*, 644 F.2d 1132 (5th Cir. 1981) that (a) federal maritime law was not intended to cover liabilities arising from mineral exploration and (b) the adjective use of vessels to assist in such operations is not sufficient to invoke the law of admiralty. This result would also eliminate the rather absurd inconsistency that otherwise exists between applying maritime law to certain mineral exploration contracts when the drilling occurs in state territorial waters, as here, while state law governs precisely the same contractual relationship a few miles further offshore pursuant to the OCSLA. *See Laredo Offshore Constructors, Inc. v. Hunt Oil Company, supra.* As Judge Garwood put it,

> Given the OCSLA directed applicability of state law to such activities when conducted on the outer continental shelf, *see Laredo,* there is plainly much to be said, as Judge Wisdom points out, for also applying state law when the same activities are conducted in the state's territorial waters.

Thurmond v. Delta Well Surveyors, supra at 957-58 (Garwood, J., concurring). Despite our reflexive invocation of admiralty jurisdiction to cover contracts involving movable offshore rigs, we have in the OCSLA context recognized that admiralty law is unsuited to dealing with

extraction of minerals from the sea bottom. *Laredo,* 754 F.2d 1228 (citing legislative history of OCSLA and *Rodrique v. Aetna Casualty & Surety Co.,* 395 U.S. 352, 89 S.Ct. 1835, 23 L.Ed.2d 360 (1969)). *See also Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 105 S.Ct. 1421, 1428, 84 L.Ed.2d 406 (1985) ("[t]here is nothing inherently maritime about" building and maintaining pipes and platforms on the outer continental shelf).

Second, we could retain our decades-old holding that movable offshore rigs are non-traditional "vessels" in admiralty, even when moored in place, while attempting to articulate consistent standards for maritime contracts and liabilities. A variation on the second alternative would be to overrule *Thurmond* and *Union Texas* and apply maritime law to all offshore mineral exploration contracts, save those governed by the OCSLA. Whether one of these results, or others we have not yet conceived, should prevail, we leave to the decision of the court *en banc.*

III.

SCHLUMBERGER'S INVITEE STATUS

[3] Avanti contended that at the time Ernest Lewis drowned, Schlumberger may have been an invitee of Pioneer rather than itself on Glendel Rig 18, inasmuch as Schlumberger may have been performing services at Pioneer's request. Although Avanti's theory is intriguing, it was not supported by sufficient evidence to raise an issue for summary judgment purposes. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Avanti purported to substantiate its claim with affidavits from two of its employees. One of them stated that the daily drilling log for the well and Schlumberger's invoice for its logging activities both covered a type of log-

ging activity that Avanti had not specifically requested Schlumberger to perform, and it noted that Avanti was not charged for this service. The second Avanti employee stated that he "had no interest" in certain activity that continued on the platform after Schlumberger removed particular equipment from the hole that was needed for Avanti's contract requirements. Neither employee attested that Schlumberger actually performed any additional logging that evening.

In response to this evidence, Glendel submitted affidavits from Mesa (formerly Pioneer) and Schlumberger attesting that Pioneer did not request Schlumberger to perform any logging services of the type contended by Avanti and that Schlumberger did not do any work on the well other than as requested by Avanti. Avanti's evidence does not squarely contradict these affidavits, hence, no genuine issue of material fact appeared over whether Schlumberger was the invitee of Pioneer at the time of the accident.

For the foregoing reasons, the judgment of the trial court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-4934

Beverly Locks LEWIS, Individually and as the Tutrix of Her Minor Children, Nona Aisha Lewis, Erisa Kironda Lewis, Jamal William Lewis, Benita Leshawn Lewis and Jeriel Nicole Lewis, Plaintiff,

v.

GLENDEL DRILLING COMPANY and Pioneer Corporation, Defendants.

AVANTI SERVICES, INC., Defendant, Third Party Defendant, Cross-Defendant, Appellant,

v.

GLENDEL DRILLING COMPANY and Highlands Insurance Company, Defendants, Cross-Plaintiffs, Appellees,

Mesa (as Successors to Pioneer Production), Third Party Plaintiff, Cross-Defendant, Appellee.

FILED
APR 16 1991

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Appeal from the United States District Court for the Western District of Louisiana

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion April 26, 1990, 5 Cir., 198__, ____F.2d____)

(APRIL 16, 1991)

Before GEE and JONES, Circuit Judges, and HUNTER*.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the requests of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones

United States Circuit Judge

*Senior Judge of the Western District of Louisiana, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

FILED
NOV 16 1988

BEVERLY LOCKS LEWIS, ET AL

VS. CIVIL ACTION NUMBER 85-1973

GLENDEL DRILLING CO.,
ET AL SECTION O - JUDGE SHAW

RULING

Now before this court is the motion of Avanti Services, Inc. for reconsideration of this court's ruling of August 3, 1988 which denied Avanti any relief from this court's prior granting of a summary judgment against Avanti.

This court has ruled on this issue twice previously; therefore only a brief summary of the facts will be given. Plaintiff, Beverly Locks Lewis, brought a wrongful death claim against the defendants as a result of her husband Ernest Lewis' drowning. Ernest Lewis was an employee of Schlumberger when he drowned while working on a well location. The well was owned by Pioneer, operated by Avanti and being worked by Glendel. Avanti called Schlumberger to the well site in the inland waters of Terrebonne Parish, in order to perform logging work on the date in question. All of plaintiff's claims against all of the

defendants have been compromised through payments made by all defendants with the exception of Avanti. The only remaining issue is the effect which various indemnity provisions may have on Avanti's liability.

Avanti claims that summary judgment against Avanti should not have been granted for either of two reasons. First, Avanti claims that an issue of material fact still exists as to whether Schlumberger, the employer of plaintiff's decedent, was working for Avanti or for Pioneer at the time of this accident. This remaining issue would preclude the granting of a summary judgment against Avanti. Secondly, Avanti argues that the contract between Avanti and Glendel is governed by Louisiana law and the Louisiana Anti-Indemnity Act as opposed to maritime law. For the sake of clarity, this court will now rule on both of these issues again and state reasons.

In its September 1, 1987 ruling, which granted Glendel's motion for summary judgment, this court stated:

> Schlumberger was called out to the location by Avanti and paid by Avanti. The facts clearly show that Schlumberger was Avanti's subcontractor. We find no merit in the claim that the time of Mr. Lewis' death has an effect on Schlumberger's status as subcontractor of Avanti.

Subsequently, Avanti filed a motion for a new trial which was denied by this court on December 11, 1987. Another motion by Avanti for relief from the September 1, 1988 order or for new trial was denied by this court on August 3, 1988.

For a third time, Avanti has asked this court, in one form or another, to decide this issue that was ruled upon on

September 1, 1987. This court finds that no genuine issue of material fact exists and upholds its previous rulings granting summary judgment against Avanti for the following reasons.

Avanti essentially argues that as soon as the logging gun was out of the hole, Avanti's "turnkey" contract became inapplicable and Schlumberger became a direct "day note" contractor of Pioneer. Based on this, Avanti argues that an issue of material fact exists as to the time that decedent died. If the death was after the logging gun was out of the hole, then Avanti argues that Schlumberger was not its subcontractor; therefore, Avanti owes no indemnity. However, the court finds that this is irrelevant because the Glendel-Avanti contract provides in paragraph 14.9 that Avanti is to indemnify Glendel not only for injuries to Avanti's subcontractor employees, but also for injuries to "operator's invitees." There is no issue of material fact concerning the fact that Schlumberger was Avanti's invitee. Avanti was clearly the party that called Schlumberger out to the rig. In *Blanks v. Murco Drilling Corp.* 766 F.2d 891 (5th Cir. 1985), the court defined an "invitee" under Louisiana law as a person who goes onto a premises with the expressed or implied invitation of the occupant, on business of the occupant or for their mutual advantage. Invitee status is determined by who invites the injured party onto the premises. In this case, it is clear that Schlumberger was invited to the site by Avanti. Schlumberger's invitee status did not end when the logging gun was taken out of the hole.

Since it has been determined that Avanti owes indemnity to Glendel under paragraph 14.9 of the contract, this court must now address Avanti's second contention. Aventi contends that the indemnity provision in the contract is unenforceable because this is a non-maritime con-

tract governed by Louisiana law not maritime law. If Louisiana law applies, then the indemnity provision is invalid based on the Louisiana Anti-Indemnity Act. If maritime law, the indemnity provision is valid.

Glendel and Pioneer moved for summary judgment against Avanti claiming that they both had maritime contracts with Avanti which provided for Avanti to indemnify Glendel and Pioneer. Avanti's latest argument is that "new law" exists, specifically *Thurmond v. Delta Well Service Surveyors,* 836 F.2d 952 (5th Cir. 1988), which mandates a finding that the indemnity provisions in question are governed by Louisiana law, not maritime law. However, it is this court's opinion that *Thurmond, supra,* is distinguishable from the present case; therefore, it is not controlling. Further, this court finds that *Theriot v. Bay Drilling Corp.,* 783 F.2d 527 (5th Cir. 1986) is still controlling.

In *Thurmond, supra,* the contract called for the performance of wireline services for a well in navigable waters. The court concluded that this was a non-maritime obligation as it did not concern the operation of the vessel. The use of the vessel for the transportation of wireline equipment and workers in *Thurmond, supra,* was incidental to the contract's principal obligation; i.e. to perform wireline services. This is distinguishable from *Theriot, supra,* where the contract did not only incidentally touch on a vessel, but directly addressed the use and operation of a vessel. It is this court's opinion that *Theriot* is still the controlling law in cases such as this where the contract was to obtain services of a drilling barge to perform drilling exploration services. As stated in this court's September 1, 1987 ruling, it was noted that the contracts of both Pioneer and Glendel with Avanti provided for services to be rendered which were directly related to Glendel Rig No. 18 - a semi-submersible vessel in maritime commerce.

Even if it is found that the contracts in question are not maritime contracts, they are at the very least "mixed" contracts, governed by maritime law. This court expressed that opinion in its August 3, 1988 ruling to which it attached the case of *Barnes v. Kerr-McGee, et al*, No. 84-3026 consolidated with 84-4754 and 85-132 (E.D. La. 1985).

Some Fifth Circuit decisions on this question appear to be in conflict in their analysis of this problem area but not necessarily in their final results which are not inconsistent with *Hale v. Co-Mar Offshore Corp., et al*, 588 F. Supp. 1212 (W.D. La. 1984) and *Home Insurance Company v. Garber*, 588 F. Supp 1218 (W.D. La. 1984). Further, this court is not aware of any appellate decisions where maritime law has not been applied to *indemnity* agreements where the injured party was either engaged in the performance of a maritime obligation arising out of a maritime contract or a mixed contract where the maritime subject matter could be separated from the non-maritime elements.

In this case the accident occurred while the decedent was engaged in the performance of a maritime obligation. If the contract is not maritime, it certainly is mixed and the indemnity agreement will be governed by maritime law. It should be noted that the *Hale-Garber* rationale has worked well in this area since the passage of the Louisiana Anti-Indemnity Act and its intrusion into offshore cases. We continue to apply *Hale* and *Garber, supra*, pending further guidance from a higher court.

For the foregoing reasons, the motion for reconsideration filed by Avanti is hereby DENIED. This court still holds to its previous rulings which granted the motions for summary judgment filed by Glendel and Pioneer.

Opelousas, Louisiana, November 16, 1988.

/s/ John M. Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

Judgment Entered - 11-17-88
By - Trelirs Moore
Copy To - Joy; Kops; Matuschka;
Redurne/Resor; Robinson/Gray/ McNamara
Truxillo; Gooch/Bourgeois; Hughes;
Simmons/Toher; Hayes;

APPENDIX D

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

FILED
NOV 16 1988

BEVERLY LOCKS LEWIS, ET AL

VS. CIVIL ACTION NUMBER 85-1973

GLENDEL DRILLING CO.,
ET AL SECTION O - JUDGE SHAW

R U L I N G

Now before this court is the motion of Glendel Drilling Company and Highlands Insurance Company for judgment on reasonableness of settlement ordering Avanti to pay to Glendel and Highlands all funds expended in defense and settlement of primary demand.

Avanti has no opposition to the court ruling on this issue but claims that a final judgment should not yet be rendered due to two unresolved issues. First, Avanti points to the motion to reconsider pending before this court concerning whether maritime or Louisiana law applies. Secondly, Avanti points to the issue of whether Schlumberger was working for Avanti or Pioneer at the time of decedent's death. Both of these issues have been decided by this court in another ruling issued by this court on this same day.

Since no unresolved issues remain in this case, this court will now rule on the reasonableness of settlement and issue a final judgment. The settling defendant need only show potential liability (rather than actual liability) to recover settlement payments where either (1) defendants tender the defense of the action to the indemnitor; (2) the claim for indemnity is founded upon a judgment; or (3) the defendant's claim is based upon a written contract of insurance or indemnity. *Wisconsin Barge Line, Inc. v. Barge Kim 300,* 546 F.2d 1125 (5th Cir. 1977); *Terra Resources v. Lake Charles Dredging and Towing,* 695 F.2d 828 (5th Cir. 1983).

In the present case, Glendel has shown that they had potential liability to the decedent's family, either as a seaman or as a 905(b) longshoreman. The record shows that plaintiff's body was found in the vicinity of an open door on the side of the rig adjacent to barges on which his equipment was located. It further shows that Glendel knew the location of the barges and the fact that the opened door was being used by Schlumberger employees despite the fact that there was no barge in front of it. Captain Chauvin's deposition states that he found no signs of foul play but the watertight door on the rig was jammed so as to obstruct the pathway along the rig. Captain Chauvin opined that decedent fell as he tried to proceed around the hatch door that was bent at the bottom and jammed open. The report of the plaintiff's expert concluded that Glendel had failed to provide the workers with a safe passageway and had created a hazard with the bent door. Further, plaintiff's rig expert was of the opinion that the accident occurred as a result of a poorly maintained door in an improper arrangement.

Glendel has clearly demonstrated "potential liability" to the court. Avanti claims that under the test stated

in *American Export Isbrandtsen Lines, Inc. v. U.S.*, 390 F. Supp. 63 (S.D.N.Y. 1975), it owes no indemnity to Glendel. Under *American Export*, Avanti argues that the indemnitee (Glendel) has a duty to take reasonable measures in the course of litigation to protect the interests of indemnitor (Avanti). It is this court's opinion that Glendel acted reasonably in settling. A *motion in limine* to exclude Captain Chauvin's testimony, which is what was suggested by Avanti, is not enough to defeat Glendel's showing of potential liability. Furthermore, Avanti could have brought the *motion in limine* itself.

Accordingly, Glendel's motion for judgment on the reasonableness of settlement is GRANTED.

Opelousas, Louisiana, November 16, 1988.

/s/ John M Shaw
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

Judgment Entered - 11-17-88
By - Trelirs Moore
Copy To - Joy; Kops, Matuschka; Reddurne/Resor; Robinson/ Gray/McNamara; Trusills; Gooch/ Bourgeous; Hughes; Simmons/ Toher; Hayes

APPENDIX E

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAFAYETTE-OPELOUSAS DIVISION

FILED
NOV 16 1988

BEVERLY LOCKS LEWIS, ET AL

VS. CIVIL ACTION NUMBER 85-1973

GLENDEL DRILLING CO.,
ET AL SECTION O - JUDGE SHAW

R U L I N G

Now before this court is the motion of Mesa Operating Limited Partners, successor in interest to Pioneer Production Corporation ("Pioneer") for judgment on reasonableness of settlement ordering Avanti to pay to it all funds expended in defense and settlement of primary demand.

Avanti has no opposition to the court ruling on this issue but claims that a final judgment should not yet be rendered due to two unresolved issues. First, Avanti points to the motion to reconsider pending before this court concerning whether maritime or Louisiana law applies. Secondly, Avanti points to the issue of whether Schlumberger was working for Avanti or Pioneer at the time of decedent's death. Both of these issues have been decided by this court in another ruling issued by this court on this same date.

Since no unresolved issues remain in this case, this court will now rule on the reasonableness of settlement and issue a final judgment. The settling defendant need only show potential liability (rather than actual liability) to recover settlement payments where either (1) defendants tender the defense of the action to the indemnitor; (2) the claim for indemnity is founded upon a judgment; or (3) the defendant's claim is based upon a written contract of insurance or indemnity. *Wisconsin Barge Line, Inc. v. Barge Kim 300,* 546 F.2d 1125 (5th Cir. 1977); *Terra Resources v. Lake Charles Dredging and Towing,* 695 F.2d 828 (5th Cir. 1983).

In the present case, Glendel has shown that they had potential liability to the decedent's family, either as a seaman or as a 905(b) longshoreman. The record shows that plaintiff's body was found in the vicinity of an open door on the side of the rig adjacent to barges on which his equipment was located. It further shows that Glendel knew the location of the barges and the fact that the opened door was being used by Schlumberger employees despite the fact that there was no barge in front of it. Captain Chauvin's deposition states that he found no signs of foul play but the watertight door on the rig was jammed so as to obstruct the pathway along the rig. Captain Chauvin opined that decedent fell as he tried to proceed around the hatch door that was bent at the bottom and jammed open. The report of the plaintiff's expert concluded that Glendel had failed to provide the workers with a safe passageway and had created a hazard with the bent door. Further, plaintiff's rig expert was of the opinion that the accident occurred as a result of a poorly maintained door in an improper arrangement.

Pioneer has clearly demonstrated "potential liability" to the court. Avanti claims that under the test stated

in *American Export Isbrandtsen Lines, Inc. v. U.S.*, 390 F. Supp. 63 (S.D.N.Y. 1975), it owes no indemnity to Pioneer. Under *American Export*, Avanti argues that the indemnitee (Pioneer) has a duty to take reasonable measures in the course of litigation to protect the interests of indemnitor (Avanti). It is this court's opinion that Pioneer acted reasonably in settling. A *motion in limine* to exclude Captain Chauvin's testimony, which is what was suggested by Avanti, is not enough to defeat Pioneer's showing of potential liability. Furthermore, Avanti could have brought the *motion in limine* itself.

Accordingly, Pioneer's motion for judgment on the reasonableness of settlement is GRANTED.

Opelousas, Louisiana, November 16, 1988.

/s/ John M Shaw

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

Judgment Entered - 11-17-88
By - Trelirs Moore
Copy To - Joy; Kops, Matuschka; Reddurne/Resor; Robinson/ Gray/McNamara; Trusills; Gooch/ Bourgeous; Hughes; Simmons/ Toher; Hayes

APPENDIX F

LSA-R.S.9: 2780. Certain indemnification agreements invalid

A. The legislature finds that an inequity is foisted on certain contractors and their employees by the defense or indemnity provisions, either or both, contained in some agreements pertaining to wells for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, to the extent those provisions apply to death or bodily injury to persons. It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.

B. Any provision contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, is void and unenforceable to the extent that it purports to or does provide for defense or indemnity, or either, to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons, which is caused by or results from the sole or concurrent negligence or fault (strict liability) of the indemnitee, or an agent, employee, or an independent contractor who is directly responsible to the indemnitee.

C. The term "agreement," as it pertains to a well for oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, as used in this Section, means any agreement or understanding, written or

oral, concerning any operations related to the exploration, development, production, or transportation of oil, gas, or water, or drilling for minerals which occur in a solid, liquid, gaseous, or other state, including but not limited to drilling, deepening, reworking, repairing, improving, testing, treating, perforating, acidizing, logging, conditioning, altering, plugging, or otherwise rendering services in or in connection with any well drilled for the purpose of producing or excavating, constructing, improving, or otherwise rendering services in connection with any mine shaft, drift, or other structure intended for use in the exploration for or production of any mineral, or an agreement to perform any portion of any such work or services or any act collateral thereto, including the furnishing or rental of equipment, incidental transportation, and other goods and services furnished in connection with any such service or operation.

D. (1) The provisions of this Section do not affect the validity of any insurance contract, except as otherwise provided in this Section, or any benefit conferred by the worker's compensation laws of this state, and do not deprive a full owner or usufructuary of a surface estate of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals on the owner's land.

(2) Any language in this Section to the contrary notwithstanding, nothing in this Section shall affect the validity of an operating agreement or farmout agreement, as defined herein, to the extent that the operating agreement or farmout agreement purports to provide for defense or indemnity as defined in Subsection B of this Section. This exception shall not extend to any party who physically performs any activities pursuant to any agreement as defined in Subsection C of this Section. For purposes of this Subsection, operating agreement and farmout agreement

shall be defined as follows:

(a) "Operating agreement" means any agreement entered into by or among the owners of mineral rights for the joint exploration, development, operation, or production of minerals.

(b) "Farmout agreement" means any agreement in which the holder of the operating rights to explore for and produce minerals, the "assignor", agrees that it will, upon completion of the conditions of the agreement, assign to another, the: "assignee", all or a portion of a mineral lease or of the operating rights.

E. This Section shall have no application to public utilities, the forestry industry, or companies who drill with the Frasch Process, so long as the work being performed is not any of the operations, services, or activities listed in Subsection C above, except to the extent those services or activities include drilling through the Frasch process.

F. The provisions of this Section do not apply to loss or liability for damages, or any other expenses, arising out of or resulting from:

(1) Bodily injury or death to persons arising out of or resulting from radioactivity; or

(1) Bodily injury or death to persons arising out of or resulting from the retainment of oil spills and clean-up and removal of structural waste subsequent to a wild well, failure of incidental piping or valves and separators between the well head and the pipelines or failure of pipelines, so as to protect the safety of the general public and the environment; or

(3) Bodily injury or death arising out of or resulting from performance of services to control a wild well so as to protect the safety of the general public or to prevent depletion of vital natural resources.

The term "wild well," as used in this Section, means any well from which the escape of salt water, oil, or gas is unintended and cannot be controlled by the equipment used in normal drilling practices.

G. Any provision in any agreement arising out of the operations, services, or activities listed in Subsection C of this Section of the Louisiana Revised Statutes of 1950 which requires waivers of subrogation, additional named insured endorsements, or any other form of insurance protection which would frustrate or circumvent the prohibitions of this Section, shall be null and void and of no force and effect.

H. The provisions of this Act do not deprive a person who has transferred land, with a reservation of mineral rights, of the right to secure an indemnity from any lessee, operator, contractor, or other person conducting operations for the exploration or production of minerals in connection with the reserved mineral rights; provided such person does not retain a working interest or an overriding royalty interest convertible to a working interest in any production obtained through activities described in Subsection C of this Section.

I. This Act shall apply to certain provisions contained in, collateral to or affecting agreements in connection with the activities listed in Subsection C which are designed to provide indemnity to the indemnitee for all work performed between the indemnitor and the indemnitee in the future. This specifically includes what is commonly

referred to in the oil industry as master or general service agreements or blanket contracts in whatever form and by whatever name. The provisions of this Act shall not apply to a contract providing indemnity to the indemnitee when such contract was executed before the effective date of this Act and which contract governs a specific terminable performance of a specific job or activity listed in Subsection C.

Supreme Court, U.S.
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(2)

No. 91-26

In The

Supreme Court of the United States

October Term, 1991

AVANTI SERVICES, INC.,

Petitioner,

v.

GLENDEL DRILLING COMPANY and PIONEER PRODUCTION CORPORATION,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF ON BEHALF OF GLENDEL DRILLING COMPANY, RESPONDENT, IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

A reading of the petitioner's writ of certiorari brought back to mind something a law professor once said concerning post-trial briefs and arguments:

> "When all else fails and you lose on the facts and law, argue that the law should be changed."

However, this case neither presents the issues, facts or legal significance to warrant such action by this Court.

1.

A review of the petitioner's application reveals he more or less concedes at this late stage, that a change in the law would be necessary for him to prevail. Significantly, the petitioner waited for this forum to raise for the first time the argument that contractual indemnity between parties of equal bargaining power should be against public policy under general maritime law. There has been no discussion, evaluation, factual preparation or other such development made in the case below concerning this new argument. Thus, the first question is not ripe for review.

2.

Furthermore, although the petitioner claims that the Fifth Circuit Court of Appeals decided this case in a way that is "in conflict with a State Court of last resort", the truth of the matter is that the Louisiana Supreme Court is in total agreement with the ruling below and would have reached the exact same result had this case been before it,

QUESTIONS PRESENTED – Continued

i.e., the contractual indemnity would have been allowed under the general maritime law. Thus, certiorari for the second question should be denied.

3.

Finally, the third question posed to the Court has been the subject of numerous cases both herein and below and involves a fact-specific inquiry not appropriate for certiorari review based on this record. Therefore, it should also be denied.

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STATUTES INVOLVED

Petitioner avers that La. R.S. Annot. 9:2780 (known as the Louisiana Oilfield Indemnity Act or LOIA and sometimes referred to as the Louisiana Anti-Indemnity Statute) and Texas Statute Tex. Civ. Parc. and Rem. Code Annot. § 127, 001 et seq. (sometimes referred to as the Texas Anti-Indemnity Statute) are "involved" in this litigation. Neither statute was enforced, overruled nor construed by any of the lower courts in this matter. The Court below determined that the contract in question was to be interpreted under the general maritime law precluding discussion of such statutes dealing with indemnity in oilwell-related contracts.

STATEMENT OF THE CASE

The plaintiff in the principal demand, Beverly Locks Lewis, brought a general maritime death claim in Federal Court with respect to her husband's drowning death which occurred in April, 1985. Named as defendants were Glendel Drilling Company (hereinafter sometimes referred to as "Glendel"), the owner of the inland drilling barge from which her husband allegedly fell, Pioneer Production Company, the lease holder, Avanti Services, Inc. (hereinafter sometimes referred to as "Avanti"), the turnkey contractor who had employed Glendel on behalf of Pioneer, and Schlumberger Well Services, the alleged Jones Act employer of the decedent. Glendel, respondent herein, brought a Cross-Claim against Avanti, petitioner herein, based on the reciprocal indemnity provisions contained in a drilling barge contract. Subsequent thereto, all

of the claims of the plaintiff against all parties, including his Jones Act employer, were settled, reserving all of the contractual indemnity claims by Glendel and Pioneer Production Company against Avanti Services, Inc.

Regarding the cross-claim of Glendel which is the subject of this appeal, petitioner, Avanti, specifically contracted for respondent, Glendel, to provide Glendel's submersible drilling barge, the *Glendel Rig 18*, to perform drilling services in a navigable water location. Avanti also called the decedent out to location as its subcontractor to perform certain work on board the inland drilling barge. While decedent was transferring from the *Glendel Rig 18* to an adjacent pipe barge, he apparently fell from a watertight door in the bulkhead into the water and drowned. Glendel had tendered its defense and indemnity to Avanti pursuant to the reciprocal indemnity provisions contained in the Avanti/Glendel contract. The indemnity agreement in the Avanti/Glendel contract was not "typical", in that it was a completely reciprocal indemnity agreement between the vessel owner and the lease operator. This is termed a "knock-for-knock" agreement wherein each party agrees to indemnify the other with regard to injuries each party's respective employees or invitees incur. When Avanti took no action, Glendel settled the death claims of the widow and her five children and subsequently moved for summary judgment on the contractual indemnity claims against Avanti.

The District Court found as a fact that maritime obligations were being pursued at the time of the decedent's death, and after considering the maritime nature of the drilling barge contract, the Court concluded that the contract was to be interpreted under maritime law. The

District Court further found the reciprocal indemnity agreements between parties of equal bargaining powers should be given full force and effect and thus, Avanti was obligated to indemnify Glendel with respect to Avanti's invitees' injuries or deaths. Petitioner did not challenge, at the District Court level, the fact that the drilling barge was a vessel for the purposes of maritime law. Further, petitioner did not argue at any lower level that the contractual indemnity agreements between parties of equal bargaining power should be void as being against public policy under the general maritime law. Therefore, there was no factual development, discussions, testimony of industry representatives or maritime operations experts, regarding either the vessel status of the inland drilling barge or the public policy argument such as to warrant review here.

SUMMARY OF ARGUMENTS

1.

Petitioner presents for the first time to any Court in this case a question as to whether contractual indemnity provisions should be void under the general maritime law as a matter of public policy. Petitioner never before argued that "liability shifting" or contractual indemnity should be disallowed under the general maritime law. Without the matter having been previously briefed, discussed below by any of the Courts, or factually developed through testimony of industry representatives, the issue clearly is not ripe for discussion or review by this Court at this time.

In any event, the general maritime law has traditionally allowed contractual indemnity provisions between parties of equal bargaining power so as to support the public policy that parties in business situations should have total freedom of contract. In fact, reciprocal indemnity agreements such as those found in the Avanti/Glendel contract should be favored in the law, in that it simplifies the litigation process, making each party liable for its own employees' injuries on the same job site. This fact was recognized by the United States Congress in 33 U.S.C.A. § 905(c) which allows reciprocal indemnity provisions under federal law between a longshoreman employer and a shipowner. Thus, where each party clearly and unequivocally agrees to defend and indemnify the other for any costs, defense, loss or liability for damages arising out of or resulting from the death or bodily injury to their employees, such an indemnity provision should be upheld.

2.

There is no rational reason to apply the Louisiana Oilfield Anti-Indemnity Act (LOIA) (La. R.S. 9:2780) as "substitute" maritime law in that the underlying principles of maritime contractual indemnity have been well developed by the federal courts, particularly in the Fifth Circuit Court of Appeals (as recognized by the Louisiana Supreme Court) without the need to resort to state law, such that parties to similar contracts have developed "stable commercial expectations" regarding the same. Inequities would result at this stage to have the courts judicially apply a novel choice of law theory to invalidate an indemnity provision contemplated and accounted for

by the parties in their negotiations, risk allocations, insurance procurements and financial considerations for undertaking the requested commercial enterprise.

Petitioner also argues for the first time that the Louisiana Oilfield Indemnity Act should be applicable in the "interest of safety", even though there has been no factual development whatsoever in the case below as to whether LOIA would actually promote safety in a way greater than a reciprocal indemnity provision between parties to a particular job site. In all probability, enforcing the indemnity clause against Avanti will promote safety, since Avanti was the one entity in control of hiring all of the contractors in this case. In fact, Glendel, as the drilling company, would have had many more individuals on board the vessel at all times, thus, its requirement to indemnify Avanti for any injuries to Glendel employees caused by anyone's negligence would promote the overall safety on the job site to preclude injuries from any source, not just for the indemnitee's own negligence.

3.

With regard to what criteria should be used to determine whether a particular contract is maritime or non-maritime, this issue was raised below and subjected to careful scrutiny by the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit Court has consistently held that contracts to provide a specific drilling barge for drilling operations on navigable waters, such as that between Avanti and Glendel, are maritime contracts in light of their significant relationship to maritime activity.

The "conflict" and/or "confusion" concerning criteria for maritime contracts arise where parties attempt to classify other types of contracts to provide certain related oilfield services which can be performed either on land or on drilling barges, as maritime. There, parties attempt to have a contract for land-based service construed under maritime law, simply because such service may temporarily be performed on a drilling barge over navigable waters. This is not such a case. The drilling barge involved herein was a single designed vessel with the express purpose of being able to navigate to a water location and operate where no land-based equipment could.

The Fifth Circuit has recognized that determining what constitutes a maritime contract is a fact-specific analysis. And, while the present case was pending for rehearing, the Fifth Circuit decided two cases specifically listing a set of criteria for making the determination of whether offshore oilfield-related contracts are, or are not, maritime. The applicable criteria set forth in those decisions would render the same result regarding contracts to supply drilling barges as reached by the Court in this case. The Court found that the contract between Avanti and Glendel which called for the use of an inland drilling barge to perform drilling work on a navigable water location, not accessible by any other means, had the type of impact on traditional maritime activity, i.e., the navigation of vessels in and around the navigable water location, which required that such contract be governed by maritime law. No review of this decision is therefore needed.

ARGUMENT

I.

NEW ARGUMENT REGARDING PUBLIC POLICY AND CONTRACTUAL INDEMNITY

For the first time during these proceedings, petitioner has made the argument that contractual indemnity provisions in maritime contracts should be disallowed under the general maritime law as being against public policy. This argument was not plead in its answer, in the Pre-Trial Order, argued to the Court of Appeals as a ground for reversing the District Court, or raised in its Petition for Rehearing before the Court of Appeals. Therefore, this Court should decline to consider this argument at this time insofar as this issue is not properly before the Court. See, *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 109 S.Ct. 998, at p. 1003 n.2 (1989). (See also cases cited therein.)

In any event, the general maritime law has traditionally enforced contractual provisions for indemnity, even for one's own negligence, so long as such provisions are clear and unequivocal and are found in contracts involving parties of equal bargaining power. Such is the case in the Glendel/Avanti contract. The courts have recognized with virtual unanimity that such indemnity contracts shall be enforceable as between parties who bargained at arm's length and from relative equal positions. *U.S. v. Seckinger*, 397 U.S. 203, 90 S.Ct. 880 (1970), reh'g denied, 397 U.S. 1031, 90 S.Ct. 1255 (1970); *American Stevedores v. Porello*, 330 U.S. 446, 67 S.Ct. 847 (1947), aff'g in part and rev'g in part, *Porello v. United States*, 153 F.2d 605 (2nd Cir. 1946); *Lefler v. Atlantic Richfield Co., Inc.*, 785

F.2d 1341 (5th Cir. 1986); *Lirette v. Popich Brothers Water Transport, Inc.*, 699 F.2d 725 (5th Cir. 1983); *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir. 1981); *Roberts v. Williams-McWilliams Co., Inc.*, 648 F.2d 255 (5th Cir. 1981); *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975); *Smith v. United States*, 497 F.2d 500 (5th Cir. 1974); *Seaux v. Lynn*, 708 F. Supp. 134 (E.D.La. 1989); *Daughdrill v. Ocean Drilling and Exploration Co. (ODECO)*, 665 F.Supp. 477 (E.D.La. 1987); *Giacona v. Marubeni Oceano (Panama) Corp.*, 623 F.Supp. 1560 (S.D.Tex. 1985); *Porche v. Gulf Mississippi Marine Corp.*, 390 F. Supp. 624 (E.D.La. 1975); *Rodrigue v. Legros*, 563 So.2d 248 (La. 1990).

As the Fifth Circuit in *Spinks v. Chevron* stated:

> We observed . . . , that no public policy prohibits parties from using a contract to shift liability for the payment of tort claims. . . . 507 F.2d at p. 226.

Further, that same circuit stated:

> It is well settled that a party may contract against liability for its own negligence. The agreement, however, must clearly indicate the intentions of the parties. . . . *Roberts v. Williams-McWilliams, Inc.*, 648 F.2d 255 at p. 264 (5th Cir. 1981).

As such, it appears that public policy does not support avoidance of contractual indemnity liability where parties are of equal bargaining position, and there is no public industry, such as the government or common carrier liability, involved. In fact, public policy actually supports the upholding of contractual indemnity agreements

which are clear and unequivocal. As one court concisely stated:

> Where there is neither industry affected with the public interest nor an unequal bargaining position between the parties, public policy actually dictates the upholding of freedom of contract principles, because it is generally economically efficient to allow private parties to allocate the costs and risks involved in doing business. *Giacona v. Marubeni Oceano (Panama) Corp.*, 623 F.Supp. 1560, at pp. 1567-68 (S.D.Tex. 1985).

The same freedom of contract principles were echoed in the case of *Daughdrill v. Ocean Drilling and Exploration Co. (ODECO), supra,* wherein the Court declared that parties to maritime contracts are free to agree as they will, if they are in equal bargaining positions. The Louisiana Supreme Court in the case of *Rodrigue v. Legros, supra,* which we will discuss below, also recognized this in *upholding* a contractual indemnity provision found in a similar drilling barge contract.

Avanti argues that contractual indemnity has "no place in maritime law" and tries to analogize the matter to tort indemnity. Tort indemnity and the cases discussing same truly have no place in the negotiation of such contracts. The Court, in *Kossick v. United Fruit Co.*, 365 U.S. 731, 81 S.Ct. 886 (1961), reh'g denied, 366 U.S. 941, 81 S.Ct. 1657 (1961), clearly explained the difference between tort and contract obligations when it stated:

> It must be remembered that we are dealing here with a contract, and therefore with obligations, by hypothesis, voluntarily undertaken, and not, as in the case of tort liability . . . obligations imposed simply by virtue of the authority of the State or Federal Government. This fact in itself

> creates some presumption in favor of applying the law tending towards validation of the alleged contract. 365 U.S. at p. 741 and 81 S.Ct. at p. 893.

In general, the legislatures have not sought to bar such indemnity in all instances. The United States Congress enacted a limited prohibition to contractual indemnity between a ship owner and longshoreman employer, not simply on the basis of public policy, but as a compromise wherein the shipowner's liability to such employees was also limited. See 33 U.S.C.A. § 905(b). Furthermore, Congress recently added § 905(c) which recognizes that *reciprocal* indemnity agreements between a longshore employer and the shipowner were enforceable so long as each party agreed to defend and indemnify the other for the cost of defense and liability for damages arising out of or resulting from the death or bodily injury to their respective employees. See 33 U.S.C.A. § 905(c). The Glendel/Avanti contract does no more.

Petitioner further avers that state law should be "substituted" as maritime law on this issue, since the State Legislatures have limited contractual indemnity for "safety reasons" with respect to people who work in marine environments of the oilfield. Again, this point was never argued nor briefed below, thus it would be difficult for the Court to make these factual conclusions without some evidence. In actuality, reciprocal contractual indemnity can make a job location more safe since liabilities are predictable for each party and the underwriting of risks will insure that all parties will bear some burden of the operation after arms length negotiations concerning the

same. The contractual indemnity agreement between Avanti and Glendel was fully reciprocal, although based on the large number of employees and invitees which Glendel would have had on site, as compared to the few of Avanti, Avanti was in a better position on the bargain, such that petitioner is unable to claim it was coerced into this agreement or that it was in an "unequal" bargaining position.

Furthermore, petitioner's first-time argument that Glendel lacked incentive to provide safe working conditions due to the indemnity provisions in the Avanti/Glendel Drilling contract, is totally untrue based on the facts of this case. As stated above, the reciprocal indemnity provisions act as an incentive to provide a safe place under *all* circumstances arising out of the job site and to promote overall safety for all parties, since they place the burden on the party best able to enforce the safety rules, i.e., the employer who has the power to fire the employee who violates the same. It also allows parties to a particular job endeavor to proportion their risks based on the number of employees and invitees one may have on site.

Finally, despite Avanti's new argument for "safety", there was no finding of fault ever made on the part of Glendel. Petitioner, at one point, argued against indemnity based on Glendel's lack of fault, indicating that Glendel should not have settled its claim for the potential fault. To now claim that the indemnity provision contained in the Glendel/Avanti contract "protects those (like Glendel) who engage in unsafe practices", does not accurately set forth the situation herein, nor does this

case present an appropriate vehicle for Supreme Court review of such an issue.

Although petitioner also urges the court to adopt LOIA as "substitute" maritime law in this instance, this would seem to run contrary to the well-settled principles precluding adoption of state law to control maritime issues where the maritime law is well developed. It is clear that Louisiana does not consider that it has an "overriding interest" in such indemnity agreements. This will be discussed in more detail in Part II below. As the Louisiana Supreme Court in *Rodrigue v. Legros* pointed out:

> The area of indemnity agreements has never been thought to be a special legislative providence of the state. Instead it has generally been governed by common law rules. . . . Because indemnity has not been considered an area subject to overriding state interest, the federal admiralty courts have developed a well-articulated set of jurisprudential rules governing indemnity in maritime contracts.
> 563 So.2d at p. 254.

The Louisiana Supreme Court also cited Judge Hunter's opinion in *O'Dell v. North River Insurance Co.* wherein he stated:

> Contractual indemnity, on the other hand is not a matter that has been the subject of complex and extensive state regulation. State Legislatures have entered the field on only a piecemeal basis in order to alter settled jurisprudential rules. (citations omitted). And, unlike marine insurance, the underlining principles of maritime contractual indemnity are well-established in the jurisprudence. 614 F.Supp. at p. 1559.

As such, there is no true reason to substitute any state's law which may interfere with the uniformity of maritime indemnity agreements, particularly where parties, such as Avanti and Glendel, contemplated that maritime law would be applicable to it.

The Louisiana Oilfield Indemnity Act (La.R.S. 9:2780) should not apply to barge rigs which have the ability to move from location to location and outside the jurisdiction of Louisiana. Substituting any particular state law to a contract capable of performance in a variety of jurisdictions without consideration of all of the consequences, would create difficulty and uncertainty in contracts involving such barges.

It is also noted that petitioner falls into the trap of citing cases involving admiralty jurisdiction over tort in determining whether or not a maritime contract exists. Petitioner cites the case of *Sohyde v. Coastal State Gas Producing Co.*, 644 F.2d 1132, 1138 (5th Cir. 1981), for the principle that the uniformity of maritime law would not be disturbed by substituting state statutory law regarding contractual indemnity in the field of oil and gas. However, Judge Brown, who originally authored *Sohyde*, specifically placed a footnote in his most recent decision concerning the determination of what constitutes a maritime contract to explain that *Sohyde* was not relevant as to whether there existed a maritime contract. See, *Domingue v. Ocean Drilling and Exploration Co.*, 923 F.2d 393, 397 n. 9 (5th Cir. 1991). It is believed that Judge Brown specifically intended to include this footnote so those who would shepherdize the *Sohyde* case later can find this clear explanation and distinction, probably in hopes that the "partisans" to whom he refers in the

footnote would cease citing the misapplication of *Sohyde* to maritime contract cases.

II.

NO STATE COURT CONFLICT

One of the most fanciful arguments submitted for certiorari by petitioner is that somehow the Louisiana Supreme Court's decision of *Rodrigue v. Legros, supra,* is in conflict with the express ruling of the Fifth Circuit Court of Appeals in the case for which certiorari is being requested. Nothing could be further from the truth. A simple reading of the *Rodrigue* case would clearly show that the Louisiana Supreme Court, faced with almost the identical questions presented to the courts below, arrived at the identical conclusion; i.e., reciprocal contractual indemnity provisions contained in a contract to supply a movable drilling barge in a navigable water situation were governed by federal maritime law, and as such, were enforceable even for the indemnitor's own negligence. The opinion is cogent and well written. It is worth time to read the opinion in full since the court provides an extremely good analysis of the issues presented in this case and navigates the questions with little confusion.

Also, being an interpretation of Louisiana law, the *Rodrigue* case should control the issue of whether or not to apply Louisiana's Anti-Indemnity Statute to the contract herein. The court noted that the LOIA would conflict with the federal interest of providing uniformity with respect to maritime law and the treatment of indemnity provisions therein. It stated:

> While the uniformity interest is minimal in many tort cases due to the fortuitous nature of accidental injuries and the strong state interest in providing redress for injuries, this interest is at its zenith when dealing with maritime contracts, which constitute actual commerce. (citations omitted). Those who engage in maritime commercial activity expect the application of uniform federal maritime law; 'in the typical case the transaction will be interstate, the interest commercial, and the consequent exclusion of state law clear.' (citation omitted).
> 563 So.2d at p. 254.

In its opinion, the Louisiana Supreme Court provided four major reasons for its holding that the maritime rule allowing contractual indemnity should prevail over any state law to the contrary. The reasons, in summary, are:

(1) Indemnity agreements are not within the special legislative providence of the states and are not a matter that has been subject to extensive state legislation other than for an occasional statute which alters settled jurisprudential rules.

(2) Federal admiralty courts have well-developed and articulated rules governing indemnity agreements.

(3) As in the instant case, most of the significant events giving rise to litigation involving the indemnity agreements at issue were rooted in maritime commerce, such as the "classic" maritime tort of the principal plaintiff against the party defendants and the fact that the main demand was governed by maritime law.

(4) Finally, the general principles of freedom of contracts require that indemnity provisions

> should be fully enforceable, so that maritime parties may allocate the risks between themselves in doing business. See, 563 So.2d at p. 254-255.

The *Rodrigue* case was not the first expression by a Louisiana Court that LOIA should not be made applicable to indemnity provisions in maritime contracts. The First Circuit Court of Appeals for Louisiana had already held that neither the Louisiana nor the Texas Anti-Indemnity Statute was applicable to invalidate indemnity agreements contained in a contract to provide a drilling barge for a water drilling location. *Cason v. Diamond M. Drilling Co.*, 436 So.2d 1245 (La. App. 1st Cir. 1983). The Court stated specifically:

> We are reluctant indeed and unwilling to create an additional exception to the general rule of the federal courts that indemnity clauses and admiralty contracts shall be enforced as written where, as in this contract, the language of the indemnity provision is clear and unequivocal. 436 So.2d at p. 1253.

Thus, it cannot be said that the decisions of the Louisiana Courts are in any way in a direct conflict with the ruling by the court below. However, in an attempt to obtain this Court's attention, petitioner takes a phrase in *Stoot v. Fluor Drilling Services, Inc.*, 851 F.2d 1514 (5th Cir. 1988), out of context and claims that the case is in conflict with *Rodrigue*. Petitioner argues that the ruling in *Stoot* that nothing in maritime law precludes the parties to a maritime contract from freely choosing Louisiana law (including the Anti-Indemnity Statute) to govern their

contract is in conflict with the *Rodrigue* decision prohibiting the application of the Louisiana Anti-Indemnity Statute by operation of law. Such is not the case. The fact that under federal law, the parties are free to choose Louisiana law to invalidate indemnity provisions in maritime contracts is the same as saying that the parties may choose not to provide indemnity to one another, thus promoting the principle of freedom of contract. It is not the same as saying that the parties *must* apply Louisiana law, where maritime law allows the parties to enter into valid indemnity agreements, if the terms are clear and unequivocal. Maritime law does not mandate indemnity provisions, it simply allows the parties the freedom to contract for the same if they so chose. Therefore, the court in *Rodrigue* was correct that the state cannot impose its own statutory scheme to invalidate indemnity provisions without impinging upon the uniform rule in maritime jurisprudence that such indemnity provisions would be allowed, if the parties so choose. Maritime law does not insist or dictate that indemnity provisions must be incorporated into every contract, thus maritime law would allow the parties to adopt a state law that prohibits indemnity between them as simply part of the freedom of contract. *Rodrigue* is not in any way in conflict with the *Stoot* case.

III.

AVANTI/GLENDEL CONTRACT MEETS MARITIME CONTRACT CRITERIA

Petitioner also urges this Court to resolve "an apparently contradictorily line of cases" regarding the determination of maritime contracts in this area. However, it is

clear that whatever conflicts or contradictions which may have been created by the case-by-case, fact-specific inquiries used to determine whether a particular oilfield service contract was a maritime contract, such did not involve contracts to supply inland drilling barges for navigable water locations. The controlling law has always been that contracts to supply such drilling barges are maritime and there is no conflict or confusion on this point.

A short list of cases can be provided where the maritime status of drilling barges was discussed or where specific mention was made of the maritime contract status of drilling barge contracts. However, literally hundreds of unreported lower court cases have applied this well-settled and unchallenged jurisprudence. The following reported cases are an example of the application of such jurisprudence: *Vickers v. Chiles Drilling Co. v. Ingersoll-Rand Co.*, 822 F.2d 535 (5th Cir. 1987); *Theriot v. Bay Drilling Corp.*, 783 F.2d 527 (5th Cir. 1986); *Lewis v. Timco*, Inc., 716 F.2d 1425 (5th Cir. 1983), remanded, 736 F.2d 163 (5th Cir. 1984), reh'g denied, 744 F.2d 94 (5th Cir. 1984); *Roberts v. Williams-McWilliams Co., Inc.*, 648 F.2d 255 (5th Cir. 1981); *Corbitt v. Diamond M. Drilling Co.*, 654 F.2d 329 (5th Cir. 1981); *Spinks v. Chevron Oil Company*, 507 F.2d 216 (5th Cir. 1975); *Transcontinental Gas Pipe Line Corp. v. Mobile Drilling Barge Mr. Charlie*, 424 F.2d 684 (5th Cir. 1970); *LeBleu v. Mud Control Equipment Corp.*, No. 90-4248 (E.D.La. 1991), (LEXIS, Genfed library), (WESTLAW, Allfeds database); *Seaux v. Lynn*, 708 F.Supp. 134 (E.D.La. 1989); *Bolfa v. Pool Offshore Co.*, 623 F.Supp. 1177 (W.D.La. 1985); *O'Dell v. North River Insurance, Co.*, 614 F.Supp. 1556 (W.D.La. 1985); *Terry v. Rebstock Drilling Co.*, 601

F.Supp. 820 (E.D.La. 1985); *Rodrigue v. Legros,* 563 So.2d 248 (La. 1990); and *Cason v. Diamond M. Drilling Co.,* 436 So.2d 1245 (La.App. lst Cir. 1983).

Drilling barge contracts require one party to provide a specially designed and built drilling barge which is specifically used to maneuver and navigate through navigable waterways, to locate and anchor itself in a body of water accessible only by other watercrafts (or seaplanes and helicopters) and perform a drilling operation in a maritime setting, all of which would have a high impact on maritime commercial activity. Inland drilling barges are highly mobile and can move from one location to another only by way of water and as such may operate in the inland water and off the shores of Texas, Mississippi, Louisiana, Alabama or other coastal states. Frequently, contracts involving drill barges are long-term contracts and not simply for one well location, such that the same contract may be enforceable in a variety of jurisdictions.

All aspects of ownership and operation are governed by maritime law. The reporting requirements, titling, certifications, navigation, operations, insurance, environmental regulations and crew requirements come from maritime rules and regulations. For these reasons, drilling barge contracts have always been considered to be governed by maritime law, at least in the Fifth Circuit Court of Appeals, where the use of drill barges are prevelant. Thus, it is not the least bit strange or inconsistent for the uniform body of maritime law to apply to the Glendel/Avanti contract.

In light of the fact that this jurisprudential rule is so well settled, consideration of altering it should not be

made on the basis of the undeveloped record presented in the case below. In view of the fact that the parties have long contemplated and adjusted to the realities that such contracts shall be governed by general maritime law, the abandonment of the rule may "upset stable commercial expectations." See, Judge Scalia's concurring opinion in *Sisson v. Ruby*, ___ U.S. ___, 110 S.Ct. 2892, 2901 n.4 (1990), intimating that settled maritime contract jurisprudential rules are a beneficial stabilizing force in commercial settings as they may be easily learned and applied.

The apparent inconsistencies and confusion referred to by petitioner arise in other types of cases where normally land-based oilfield operations, tangentially or temporarily performed on a vessel, provoke the parties to argue the improper application of maritime law to their contracts. This is where the inconsistency creeps into the discussions involving oilfield contracts. Petitioner is now attempting to use such rulings, which were designed to eliminate non-vessel contracts fortuitously applying in a maritime setting, to disqualify contracts dealing with drilling barges and vessels simply because those contracts may also involve oilfield operations.

The "rather absurd inconsistencies" noted by the court below involve the application of maritime law to inland drilling barges and state law to fixed platform drilling rigs located on the Outer Continental Shelf. These consequences result directly from the operation of the Outer Continental Shelf Lands Act as it applies to offshore drilling. 43 U.S.C.A. § 1331, et seq. This Court commented in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421 (1985), that the OCSLA itself draws a clear *geographical boundary* which predictably resulted in the

inconsistency. The court noted that it was not within its realm to resolve the inconsistency and in fact stated:

> As we have said before in this area, if Congress' coverage decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them. 105 S.Ct. at p. 1429.

Although petitioner claims that *Thurmond v. Delta Surveyors*, 836 F.2d 952 (5th Cir. 1988), is somehow in conflict with the decisions reached in the court below, it is clear that petitioner misses the point stated in that case. The contract in *Thurmond* was a state-oriented contract for non-maritime services which only tangentially called for the service of a vessel and therefore was not intended by the parties to be governed by maritime law. The factors set forth in the decisions of *Davis & Sons, Inc v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990), reh'g denied, 924 F.2d 1054 (1991), and also as utilized in *Domingue v. Ocean Drilling and Exploration Co.*, 923 F.2d 393 (5th Cir. 1991), specifically articulate a consistent standard for analysis of oilfield contracts to determine whether they will be governed under maritime law. This consistent underlying analysis is for determining whether those "gray" contracts are to be governed by maritime law. However, by applying the factors set forth in the *Davis & Sons* case to the present case, the Glendel/Avanti contract and its indemnity provision are clearly to be governed by general maritime law.

As a final argument, petitioner urges the court to find that the drilling barge was not a "vessel" for the purposes of maritime law. As respondent pointed out to the court below, the vessel status of the drilling barge was never

challenged at the district court level and therefore no record was developed as to properly place before the court all of the factors necessary for it to reconsider the longstanding jurisprudence finding that semi-submersible drilling barges are vessels. There are no answers to the relevant questions in the record, as to whether the drilling barge had Coast Guard certification, whether it had licensed marine personnel operating the same, the number and frequency of the various voyages, the susceptibility of the vessel to sea movement, tides, etc., whether it was provided coverage under Marine, Hull and Protection and Indemnity insurance policies and all other relevant issues that might be important in determining this novel challenge, since all parties had conceded that the Drilling Barge met the accepted definition of vessel.

For over 30 years, drilling barges have been classified as vessels. Although certain cases have challenged vessel status with regard to other types of work barges, which were not shown to have all the indicia of vessel status at trial, in this case, petitioner made no inquiry on any of these points. Basically, petitioner's argument at this level is in the abstract. Furthermore, petitioner attempts to string cites of cases together which deal with totally separate and distinct factual settings to argue that the drill barge was not a vessel. The only facts which were found by the district court in this case was that the drill barge functioned as a vessel in navigation under the facts and circumstances presented to it. As such, it is not appropriate for the petitioner to ask at this late date for this finding to be reconsidered.

CONCLUSION

1.

It is respectfully submitted that the writ should be denied not simply because petitioner's policy argument was not properly submitted for full consideration by the court below, but because maritime commerce is promoted when contractual indemnity provisions between parties of equal bargaining positions are enforced as written. Allowing the parties to a maritime contract to enter into a reciprocal indemnity agreement supports the principle of freedom of contract in the maritime commercial setting, allowing the parties to economically allocate the risk proportionate with one's exposure to the task at hand, so as to allow each party to properly assess his cost of doing business.

2.

Petitioner's allegations of a conflict between federal and state law is an extreme exaggeration, in view of the fact that the Louisiana Supreme Court, in considering the same issues involved in an almost identical situation, reached the same conclusion, i.e., a contract to supply a drilling barge should be governed by maritime law, and not Louisiana law, and as such, reciprocal indemnity agreements between parties of equal bargaining power should be enforced as written. The court in reaching this conclusion found that Louisiana did not have an over-riding state interest in applying its statutes concerning "contractual indemnity shifting".

3.

Finally, the writ should be denied insofar as there is no confusion in the law with regard to the determination that maritime law governs indemnity provisions in contracts to supply inland drilling barges under the applicable criteria set forth in the decisions rendered by this court and the lower courts. The contract specifically pertains to and calls for the use of a vessel to perform a job in a maritime setting, all of which impacts on maritime commercial activity, and as such should be maritime. Furthermore, any inconsistency or "absurd results" which have occurred because of the arbitrary lines of jurisdiction drawn by the Outer Continental Shelf Lands Act (which is not involved in this case) is for the Congress to resolve and does not require that this Court alter the longstanding jurisprudence that maritime law controls the indemnity provisions found in contracts to supply drilling barges.

Respectfully submitted,

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(3)

NO. 91-26

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In the Supreme Court of the United States

OCTOBER TERM, 1991

AVANTI SERVICES, INC.,
Petitioner,

V.

GLENDEL DRILLING COMPANY and
PIONEER PRODUCTION CORPORATION,
Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF ON BEHALF OF AVANTI SERVICES, INC., PETITIONER, IN SUPPORT OF PETITION

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I.

CONTRACTUAL LIABILITY SHIFTING

A. NEW ARGUMENT

At page 7 of its opposition brief, Glendel cites *De Shaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 109 S.Ct. 998, at p. 1003 n.2 (1989), in support of its suggestion that this Court should decline to consider Avanti's argument that contractual liability shifting has no place in the comparative fault principles of maritime law. This Court should decline, says Glendel, because Avanti raised this argument for the first time in its petition to this Court. In *De Shaney,* however, the petitioner's argument was made "for the first time in petitioner's brief to this Court: it was not ... raised in the petition for certiorari." (Id.)

Moreover, Avanti is suggesting a change in the law as established by this Court, which only this Court can do. The lower courts could not effect such a change without overruling decisions of this Court which, of course, they were powerless to do. Therefore, to have raised this issue prior to Avanti's petition to this Court would have been a vain and useless exercise.[1]

B. SAFETY REASONS

At page 10 of its brief, Glendel again argues that an

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[1] In its suggestion for *en banc* rehearing, Avanti suggested that contractual indemnity shifting be outlawed by an alternate means: adepting state anti-indemnity statutes as "substitute" maritime law. This the *en banc* court could have done by *following* a decision of this Court in *Kossick v. United Fruit Co.,* 365 U.S. 731, 81 S.Ct. 886, 6 L.Ed.2d 56 (1961), *reh'g denied,* 81 S.Ct. 1657.

issue was not argued below, so it would be difficult for this Court to make the factual conclusions that the state anti-indemnity statutes are safety-related. Apparently, Glendel would have this Court believe that Avanti thought up the safety connection. But the conclusion which Glendel argues would be difficult for this Court to make, as well as the safety connection which Glendel argues does not exist, were both established in a decision which Avanti cited in footnote 1 at page 7 of its petition herein. In *Bryant v. Platform Well Service, Inc.,* 563 F.Supp. 760 (E.D. La. 1983), the court found as follows:

> The mineral industry is one of the most important industries in this state. Additionally, it is well known that the exploration for oil and gas is an extremely hazardous undertaking. It is the size of the minerals industry and the vast number who work in it which motivated the legislature to move to limit indemnity agreements.
>
> LSA-R.S. 9:2780 on its face prevents one company (indemnitee) from requiring another company (indemnitor) to idemnify it for its own negligence or fault. If the indemnitee can by contract insulate itself from exposure for injuries to workers, where it creates the hazard causing the injury, there is less motivation to follow the safest work practices. If the indemnitee is prevented from contracting away the responsibility, then it will be more likely to take the extra needed steps to avoid injury to workers. This statute, is a rational way to protect Louisiana workers and the oil industry in general from less than optimum safety measures. (p. 763).

Thus, having incorrectly assumed that there is no public policy impetus behind the outlawing of contractual liability shifting, Glendel quotes at page 8 of its brief from

Spinks v. Chevron Oil Co., 507 F.2d 216 (5th Cir. 1975), to the effect that "no public policy prohibits" contractual liability shifting.[2]

Having incorrectly assumed that the mineral industry in Louisiana is not affected with the public interest, Glendel quotes at page 9 of its brief from *Giacona v. Marubeni Oceano (Panama) Corp.*, 623 F.Supp. 1560 (S.D. Tex. 1985), to the effect that, where there is no "industry affected with the public interest", public policy actually dictates the upholding of contractual liability shifting because it is economically efficient. But, as found in *Bryant*, supra, in the offshore mineral industry public policy dictates that economic efficiency comes at too great a cost in unsafe work practices.

C. INDEMNITY PROMOTES SAFETY?

Glendel's argument, at page 11 of its opposition brief, is particularly irksome. It describes as "totally untrue" Avanti's argument that contractual liability shifting reduces the motive for safety. (But please see *Bryant*, supra, in which the court found just that.) It then states that indemnifying a party for its own fault somehow *promotes* safety because it places the safety incentive on the employer who can fire an employee who violates safety rules. But a look at the facts of this case exposes the fallacy of Glendel's argument. Here, a family man lost his life because some Glendel employee who was in charge of Glendel's barge did not fix a bent door on the perimeter of

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[2]*Spinks* applied maritime law. There was no consideration of whether state law even might apply. Spinks' employer, Labor Services, contracted only to provide labor, not a vessel (507 F.2d at 220). Under the later decision in *Thurmond v. Delta Well Surveyors*, 836 F.2d 952 (5th Cir. 1988), Louisiana law (and its public policy) would have applied to, and voided, the indemnity provisions in that contract.

the barge, even though Glendel was aware of the hazard thus created. Avanti could not repair Glendel's barge or fire Glendel's barge foreman if he did not see to it that the hazard was eliminated. Only Glendel could eliminate the hazard. Under comparative fault principles, Glendel would have been responsible for its dereliction and thus would have incentive to see to it that the hazard was eliminated. However, simply because of contractual liability shifting, Glendel seeks to wash its hands of responsibility and walk away.

II. STATE COURT CONFLICT

At pages 16-17 of its opposition brief, Glendel recharacterizes Avanti's argument so as to apply to the ruling in *Stoot v. Fluor Drilling Services, Inc.*, 851 F.2d 1514 (5th Cir. 1988), that "nothing in maritime law precludes the parties to a maritime contract from freely choosing Louisiana law." (Glendel brief, p. 16). But that is not the ruling with which the Louisiana Supreme Court decision conflicts.

At page 8 of its petition, Avanti cited the ruling in *Stoot* that "Louisiana's Anti-Indemnity statute does not conflict with any *purpose* of maritime law ..." Then, at pages 8-9, Avanti quoted the holding in *Rodrigue v. Legros*, 563 So.2d 248 (La. 1990), *reh'g denied*, 563 So.2d 257, that "application of the Louisiana [Oilfield Anti-Indemnity] statute would interfere with the uniform features of maritime law ..." It certainly appears to Avanti that there is a conflict here.

The more significant conflict, however, is between the holding in *Rodrigue* and that in *Sohyde v. Coastal States Gas Producing Co.*, 644 F.2d 1132 (5th Cir. 1981), which (as Glendel points out and as discussed in the next section of this brief) dealt with maritime tort jurisdiction,

and held that an accident involving a barge in inland Louisiana waters was

> "not of such a character that leaving the parties to pursue state law remedies would disturb the federal interest of maintaining the uniformity of maritime law." (p. 1138).

This holding in *Sohyde* was in contemplation of "the traditional concept of the role of admiralty" (Id.) the purpose of which, as held in *Stoot,* does not conflict with the Louisiana statute. Taken together, then, the rulings in *Stoot* and *Sohyde* referred to by Avanti (not the ruling referred to by Glendel in its recharacterization) certainly seem to conflict with *Rodrigue.*

Perhaps more significant to this Court's considerations is the conflict in *any* decision by *any* court with one of the two lines of cases referred to by the panel herein as "apparently contradictory" (Pet. App. 21). In other words, whichever way any court, state or federal, rules on this issue, it is going to conflict with one or the other of those lines of cases. Indeed, in *Rodrigue* the Louisiana Supreme Court recognized both this conflict ("but see *Lewis v. Glendel Drilling Co.*", which the court characterized as "applying the rule but questioning its persuasiveness"-563 So.2d at 251) and the lack of guidance by this Court (563 So.2d at 253).

III.

MARITIME CONTRACT CRITERIA

Beginning at page 17 of its opposition brief, Glendel argues that its contract meets the criteria for a maritime contract. But Glendel misses the point. Avanti questions the validity of the criteria, not whether Glendel's contract meets those criteria.

At page 21, Glendel accuses Avanti of raising the "vessel" status issue which was not raised below and argues that the facts were not developed in order to allow the courts below to determine whether Glendel's barge met the criteria to be a "vessel". But that issue was raised in the panel decision itself, not as to whether Glendel's barge factually met the criteria, but as to the validity of "vessel" status as a criterion to determine the nature of the contract (Pet. App. 8a).

At page 13, Glendel refers to Judge Brown's footnote in *Dominque v. ODECO,* 923 F.2d 393, 397 n.9 (5th Cir. 1991), placed there "in hopes" that researchers would be able to use it to distinguish between tort and contract cases (a distinction which the various panels of the Fifth Circuit have not made). The fact that the judge felt the need to do that speaks more eloquently than Avanti ever could to the morass of ill-founded and conflicting decisions which Avanti is asking this Court to address.

The panel herein felt constrained (Pet. App. 6a) to follow *Theriot v. Bay Drilling Corp.,* 783 F.2d 527 (5th Cir. 1986), and the criteria used therein to determine whether a contract is maritime.

Theriot relied on *Corbitt v. Diamond M. Drilling Co.,* 654 F.2d 329 (5th Cir. 1981), in which Sladco contracted with Shell to provide a casing crew (a wireline service) to work on the barge furnished by Diamond M. to Shell. Corbitt, a *Sladco* employee, was injured while performing wireline services. The court ruled that maritime law applied to the Shell/Sladco contract because three prior decisions "established beyond cavil" that it was a maritime contract.[3] The decisions it cited (654 F.2d at 332) are (1)

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[3] It should be noted here that *Domingue v. ODECO,* supra, is in direct conflict with *Corbitt.* In *Domingue,* as in *Corbitt,* Dimensional

Transcontinental Gas Pipeline Corp. v. Mobile Drilling Barge, 424 F.2d 684 (5th Cir. 1970), (2) *Halliburton v. Norton Drilling Co.,* 302 F.2d 431 (5th Cir. 1962), and (3) *Tri-State Oil Tools Indus. v. Delta Marine Drilling Co.,* 410 F.2d 178 (5th Cir. 1969).

(1) *Transcontinental* simply noted, without discussion of whether the contract therein was maritime, that "the construction of a maritime contract is governed by federal, not state law." (424 F.2d at 691). It cited two decisions, neither of which considered a contract.[4]

(2) *Halliburton* did not involve a contract. It held only that maritime law applied to *tort* indemnity sought on the alternate theories of active-passive negligence and quasi-contractual implied warranty of workmanlike performance because the plaintiff's tort action was brought under maritime law.

(3) *Tri State* was recognized in *Corbitt* itself to have held only that "federal maritime law of tort indemnity controls where accident occurs in navigable waters". (654 F.2d at 332).

The point is this: the present criteria for determining whether a contract is "maritime" have been developed

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Footnote 3 continued.

substitute Sladco) contracted with ODECO (substitute Shell) to do wireline work on ODECO's (Substitute Diamond M.) jack-up drilling rig. Domingue, a Dimensional employee, was injured while performing wireline services (as was Corbitt). The *Domingue* court, however, held that the contract was non-maritime and reversed the trial court's application of maritime law (923 F.2d at 398).

[4] *A/S J. Ludwig Mowinckels Rederi v. Commer. Steve. Co.,* 256 F.2d 227 (2nd Cir. 1958), *cert. dismissed,* 358 U.S. 801, 79 S.Ct. 9, 3 L.Ed. 2d 49; and *Halliburton,* supra.

from *tort jurisdiction* decisions. The panel decision herein questioned both the "persuasiveness" of the decisions involved in that development (Pet. App. 9a) and the "uncertain policy underpinning [the] result" (Pet. App. 2a).

Avanti is simply asking this Court to review the criteria (if they are not mooted by this Court's outlawing of contractual liability-shifting altogether). As Avanti asked at page 14 of its petition,

> "should not the nature of a contract be determined by the type of service(s) to be provided and the purpose of the vessel as contemplated in the contract [rather than by tort jurisdiction criteria]?"

CONCLUSION

Louisiana law and maritime law share a common interest in the safety of those whom the law is designed to protect. Louisiana has taken the appropriate step of eliminating contractual liability shifting in order to promote safety. But, unless this Court acts, maritime law will continue to subject oilfield workers to unnecessary hazards which should have been cured if the proper incentive had not been contracted away. And whether or not that incentive is present or is contracted away will continue to be determined by the fortuitous chance of whether a worker's employer contracted in such a way as to meet or not meet wholly inappropriate criteria.

Despite Glendel's unfounded opposition, there remains no reason why this Court should not consider this matter and every reason why it should. The safety of workers in the maritime environment depends on it. So does the uniformity of maritime law, which at present

treats liability shifting in tort differently than it does in contract, although such shifting accomplishes the same undesirable end in both contexts.

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